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IN THE

SUPREME COURT OF THE UNITED STATES.

October Term, 1940.

No. 990.

THE UNITED STATES,

PETITIONER,

v.

NUNNALLY INVESTMENT COMPANY.

On Writ of Certiorari to the Court of Claims.

BRIEF FOR THE RESPONDENT.

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BRIEF FOR THE RESPONDENT.

OPINION BELOW.

The opinion of the court below (R. 20-32) is reported in 36 F. Supp. 332.

QUESTION PRESENTED.

Where a taxpayer has recovered judgment against a Collector of Internal Revenue for an overpayment of income and profits taxes and later files claim and brings suit in the Court of Claims for a further refund of tax for the same year on a new ground, which is determined to be meritorious, is the Court precluded from rendering judgment against the United States by reason of the former suit and judgment against the collector?

STATEMENT.

The special findings of fact by the Court of Claims are summarized at some length in the brief for petitioner. Briefly stated, the material facts are these. Respondent had brought suit in a District Court against a Collector of Internal Revenue for an overpayment of income tax for 1920 on the sole ground that the cost basis for tax purposes of the assets sold in 1920 had been understated by the Commissioner. Respondent recovered a judgment in that suit, which was paid by the United States. But the cost basis established was not as high as that claimed, and for that reason only a portion of the taxes paid was recovered.

Thereafter, respondent filed a further claim for refund of 1920 taxes on a ground not previously raised, and on rejection of the claim brought suit against the United States in the Court of Claims.[1] That Court held the new claim meritorious and rendered judgment for the respondent, over the Government's contention that the previous suit and judgment against the collector was a bar to the proceeding against the United States.

The Government does not here question the lower court's holding on the merits. Nowhere in the petition or brief is there any denial that the Government had collected from respondent and is retaining taxes excessive in the amount of the judgment. The Government attacks the decision below solely on the technical ground that judgment against the United States was precluded by the previous judgment against the collector.

[1] In addition to the ground on which judgment was rendered by the Court of Claims, the claim for refund contained a number of other grounds, since abandoned.

SUMMARY OF ARGUMENT.

This case presents exactly the same question that was presented to this Court 23 years ago in the *Sage* case. In the *Sage* case the Government made exactly the same contention which it makes here, namely, that the taxpayer was precluded from bringing a tax refund suit against the United States by reason of having previously sued the collector, and advanced much the same arguments upon which it relies here. In the *Sage* case the Court unanimously rejected this contention, and its decision has repeatedly been followed and cited with approval by this Court during the past 23 years.

The Government attempts desperately but unsuccessfully to distinguish or to discredit the *Sage* decision. The *Sage* decision was not, as the Government here contends, based on the 1912 Statute referred to in the decision; it was not overruled by this Court in the *Moore Ice Cream Co.* case; it was not affected at all by the statutory provision creating the Board of Tax Appeals; nor was it affected in any way by the statutes enacted by Congress with respect to interest and protest in connection with tax refund suits; neither is there any merit in the Government's attempted distinction under the probable cause statute.

The Government is here simply making again the same arguments which it made in the *Sage* case; and the arguments are no better now than they were then, besides being now rejected by a line of unanimous decisions. The Government has repeatedly relied upon the *Sage* decision; and it does not attempt to show that any unfair or oppressive consequences have resulted from the decision. Unfairness would obviously result if this Court should overrule the decision and destroy the only existing remedies of persons such as respondent who have been entitled, in shaping their courses, to rely upon the unanimous decisions of this Court

in the *Sage* case and the cases following it. The doctrine of stare decisis applies with particular force in such a situation. If any changes need to be made in the law as to collector suits, such changes should be made by Congress, since Congress alone is in a position to act on the subject as a whole, to avoid the confusion which is almost certain to result from a piece-meal overruling of a line of established decisions of this Court, and to make the desired changes prospective only so as to avoid gross inequities.

ARGUMENT.

I. This Case Is Squarely Covered by the Decision in the *Sage* Case.

This case presents exactly the same question that was presented to this Court 23 years ago in *Sage v. United States*, 250 U. S. 33 (1919).

In the *Sage* case as in the present case the taxpayer first sued the collector and recovered a portion of the taxes paid, and then sued the United States in the Court of Claims to recover a further portion of such taxes. In the *Sage* case as in the present case the Government argued that the earlier suit against the collector barred the taxpayer from maintaining the later suit against the United States. In the *Sage* case the Court unanimously rejected the Government's argument and squarely held that suit against the collector does not bar a subsequent suit against the United States. The opinion was written by Mr. Justice Holmes.

The *Sage* decision has repeatedly been followed and cited with approval by this Court. See *Smietanka v. Indiana Steel Co.*, 257 U. S. 1 (1921); *Union Trust Co. v. Wardell*, 258 U. S. 537 (1922); *Graham v. Goodcell*, 282 U. S. 409 (1931); *Bankers Pocahontas Coal Co. v. Burnet*, 287 U. S. 308 (1932); *Tait v. Western Maryland Ry. Co.*, 289 U. S. 620 (1933); *Lowe Bros. Co. v. United States*, 304 U. S. 302 (1938); *Sunshine Coal Co. v. Adkins*, 310 U. S. 381, 403 (1940); *United States v. Kales*, No. 35, decided December 8, 1941.

In *Bankers Pocahontas Coal Co. v. Burnet*, supra, the Court said, with respect to the contention that a previous suit against the collector was res judicata in the subsequent suit against the Commissioner, that (287 U. S. at p. 312):

> "With respect to this contention it is sufficient to

> say that the suit in the District Court was not against the Commissioner of Internal Revenue, the respondent here, but against the Collector, judgment against whom is not res judicata against the Commissioner or the United States. Graham v. Goodcell, 282 U. S. 409, 430; Sage v. United States, 250 U. S. 33; see Smietanka v. Indiana Steel Co., 257 U. S. 1; compare Union Trust Co. v. Wardell, 258 U. S. 537."

In *Tait v. Western Maryland Ry. Co.*, supra, the Court said (289 U. S. at p. 627):

> "In a suit for unlawful exaction the liability of a collector is not official but personal. Sage v. United States, 250 U. S. 33; Smietanka v. Indiana Steel Co., 257 U. S. 1; Graham v. Goodcell, 282 U. S. 409, 430. And for this reason a judgment in a suit to which he was a party does not conclude the Commissioner or the United States. Bankers Pocahontas Coal Co. v. Burnet, 287 U. S. 308, 311, ante, 325, 329."

It is clear therefore that the *Sage* case is squarely in point and requires a decision in favor of the taxpayer in the present case.

II. The Government's Attempt to Distinguish or Discredit the *Sage* Case Is Unsuccessful.

The Government attempts desperately but unsuccessfully to distinguish the *Sage* case from the present case or to discredit it.

First. The Government says the *Sage* decision was based on the 1912 Statute referred to in the decision. This argument is unsound. The brevity of the reference in the *Sage* opinion to the 1912 Statute, together with the fact that such reference is prefaced by the word "perhaps", shows clearly that the 1912 Statute was mentioned in the opinion only as a *possible* alternative basis for the decision, and that it was in no way intended to detract from the actual

holding in the case fully developed by Mr. Justice Holmes in the earlier part of the opinion that there was a difference in parties because the suit against the collector was personal and not a suit against the United States. The later decisions of this Court fully confirm this view. Thus, in the *Bankers Coal Co.* case, supra, the Court followed the *Sage* decision and held that the earlier suit against the collector was not res judicata in a later suit against the Commissioner or the United States, although there was clearly no 1912 Statute or anything like it in the *Bankers Coal Co.* case.[2]

In the *Smietanka* case, supra (opinion by Mr. Justice Holmes), decided just two years after the *Sage* case, the taxpayer in attempting to avoid the holding of the *Sage* case urged that the *Sage* decision did not turn upon the

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[2] The Government suggests (Br., p. 25, footnote 7) that the *Bankers Coal Co.* case can be distinguished because there the earlier suit was for a different tax year. A reading of the opinion in the *Bankers Coal Co.* case will show that the Court did not attribute any significance at all to this fact, but followed the *Sage* case and rested the decision squarely on the sole ground that the earlier suit against the collector was against a different party and therefore was not binding in the later suit against the Commissioner or the United States. Cf. *Tait v. Western Maryland Ry. Co.*, supra; and compare the Government's argument here with its argument in the *Bankers Coal Co.* case (No. 104; October Term 1932, Govt. Br., p. 20):

> "On the other hand, the suit in the District Court was against the Collector of Internal Revenue. In *Sage v. United States*, 250 U. S. 33, this Court held that the United States was not privy to a judgment against a collector of internal revenue, and that the judgment was not a bar in a suit brought against the United States in the Court of Claims involving a part of the same tax. In that case, this Court pointed out that the suit against the collector is personal and its incidents are different. We believe that the petitioners' argument that the Commissioner is privy to the suit against the collector is fully answered by what this Court said in the Sage case, supra, which the court below accepted as controlling upon this question. That case was cited with approval by this Court in *Graham & Foster v. Goodcell*, 282 U. S. 409, 430. See also *Smietanka v. Indiana Steel Co.*, 257 U. S. 1, 4, 5. Cf. *Union Trust Co. v. Wardell*, 258 U. S. 537."

lack of identity of parties in the two suits, but on the 1912 Statute referred to above. The Court there considered the argument so clearly without merit that it did not even refer to it in the opinion.

It is clear from the foregoing that the Government errs when it says the *Sage* case was based on the 1912 Statute.

Second. The Government urges that the *Sage* case was, in effect, overruled by *Moore Ice Cream Co. v. Rose*, 289 U. S. 373 (1933). The *Moore Ice Cream Co.* case did not involve any question of a second suit, such as was involved in the *Sage* case and in the present case. The only question there decided was the question of the constitutional right of Congress under the due process clause retroactively to abolish the requirement of protest at the time of paying the tax where the suit was against the collector. The *Sage* case was not mentioned in the *Moore Ice Cream Co.* decision. Exactly three weeks after the *Moore Ice Cream Co.* case was decided, the Court expressly approved of the *Sage* case, in *Tait v. Western Maryland Ry. Co.*, supra. See the quotation from the *Tait* case at page 6, supra. Also, it was at the same term of Court, only several months before the *Moore Ice Cream Co.* case was decided, that the Court followed and approved the *Sage* case in *Bankers Coal Co. v. Burnet*, supra. Also, the *Sage* case has since been cited with approval by this Court, for exactly the holding for which it is now cited by respondent, in the *Sunshine Coal Co.* case, supra (1940), and the *Kales* case, supra (1941). The foregoing facts show clearly that this Court had no intention whatsoever in the *Moore Ice Cream Co.* case of overruling the *Sage* case.

Third. The Government contends that the *Sage* case is distinguishable from the present case because of the fact that the Board of Tax Appeals has been created by Congress since the *Sage* decision was rendered. In the stat-

utes relating to the Board of Tax Appeals, the only thing that Congress has provided with respect to suits for refund is that no such suit can be maintained by a taxpayer in any court if the taxpayer has appealed to the Board.[3] This shows that Congress had no difficulty in expressing its intention to prohibit suits for refund where it wanted to prohibit such suits. If Congress had wanted to prohibit a refund suit against the United States where a previous suit had been brought against the collector, it would have so provided. It did not so provide and such provision cannot possibly be read by implication into the statutes creating the Board of Tax Appeals.

Fourth. The Government argues (Br., pp. 21-22) that the *Sage* case is no longer to be followed, because since the *Sage* case was decided, Congress has made interest collectible in suits against the United States just as in suits against collectors; and has removed the necessity of protest in suits against collectors and in suits against the United States. The statutes just referred to will be searched in vain for any language which even remotely suggests that Congress intended to alter the rule laid down by this Court in the *Sage* case. These amendments made by Congress as to interest and protest show that Congress has not hesitated to change the procedure with respect to tax refund suits where it considered such change was necessary or desirable. Congress has not considered it necessary or desirable to make any change in the rule laid down by this Court in the *Sage* case, although it is now almost 23 years since the *Sage* case was decided. The Government's argument therefore fails entirely in so far as it seeks to find support in the statutes enacted by Congress since the *Sage* decision was rendered.

Fifth. The final argument of the Government (Br., pp.

[3] Revenue Act of 1926, Section 284 (d), Act of Feb. 26, 1926, ch. 27, Sec. 284, 44 Stat. 9, 66.

23-25) is that the doctrine of the *Sage* case is not applicable where as here it is shown that the collector acted under the direction of the Commissioner. The argument seems to be that under Section 989 of the Revised Statutes a collector acting under the direction of his superior officer is certain that a certificate will be issued making the judgment against him payable out of the Treasury and that, therefore, the United States is a party to the suit and judgment contrary to the holding in the *Sage* case. The argument is clearly without merit. Whether the collector acted (1) with probable cause as in the *Sage* case or (2) under orders of a superior officer as in the present case, in either event he must get from the trial court the certificate referred to in Section 989 of the Revised Statutes in order to free himself from personal liability and to make the judgment payable by the United States. The issuance of this certificate is not certain even where the collector acted under the direction of a superior officer.[4]

In either event under whichever clause the certificate is issued and however certain the collector is that the certificate will be issued, the issuance of the certificate does not make the United States a party to the suit. While action under the direction of a superior did not appear in the record in the *Sage* case, it is not shown that it did not exist. It does clearly appear from the record in the *Bankers Coal* case (18 B. T. A. 901, 907). Action under the direction of the Commissioner also appeared from the record in the *Smietanka* case, supra.[5]

What the Government is really trying to do under the attempted distinction between the two clauses in Section

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[4] In *Toledo Edison Co. v. McMaken*, 103 F. (2d) 72 (C. C. A. 6th, 1939), cert. den. sub. nom. *Toledo Rwy. and Light Co. v. McMaken*, 308 U. S. 569, a certificate was refused even though the collector collected under the direction of his superior.

[5] The same fact probably appears in the records in most, if not all, of the cases following the *Sage* case.

989, which clearly permit of no such distinction, is to revive the same argument which it made in the *Sage* case, namely, that the suit against a collector is really a suit against the United States, since the suit is defended by the Department of Justice and judgment is expected to be paid out of the Treasury. The argument was rejected in the *Sage* case and must be rejected here.

The Government is misfaken when it says that a suit against the collector is the same thing as a suit against the United States. There are a number of practical differences which Congress, in spite of the various statutes which have been passed dealing with the remedies of taxpayers, has not seen fit to disturb. For example, either party is entitled to a jury in a collector suit but not in a suit against the United States. Costs are recoverable in suits against collectors but not in suits against the United States. Apparently a claim against a collector may be assigned,[5a] but not a claim against the United States. And more important than any of the foregoing—a suit against a collector, being personal, is protected by the Fifth Amendment and, unless a fair remedy is substituted, cannot be abolished under claim of sovereign immunity, as can a suit against the United States.[5b]

III. The *Sage* Case Should Not Be Overruled; If Any Procedural Change in Collector Suits Is Desirable It Should Be Accomplished by Legislation.

Aside from its unsuccessful attempts to distinguish the *Sage* case, the Government makes only one argument, and that is that the taxpayer should not be permitted to sue twice on the same cause of action. The Government made

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[5a] See *Masonic Country Club v. Holden*, 12 F. (2d) 951 (W. D. Mich.). "Claims against the United States are not assignable, U. S. C. A., Title 31, Sec. 203.

[5b] See our Brief in Opposition, pp. 11-13, and footnotes 8 and 9.

this same argument in the *Sage* case and it was there rejected. The very same quotation from *Stark v. Starr*, 94 U. S. 477, 485, quoted and relied upon by the Government near the beginning of its brief in the present case, was quoted and relied upon by the Government near the beginning of its brief in the *Sage* case. The Government's argument is no stronger now than it was when the *Sage* case was decided, and there are now 23 years of unanimous decisions of this Court rejecting it.

This Court has followed and approved the *Sage* case unanimously since it was decided, and Congress has not considered it necessary to change the rule there laid down, although it has made other changes in the law as to tax refund suits during these 23 years, and the Government instead of securing a change by Congress has itself relied frequently upon the *Sage* case. In a majority of the cases in this Court cited at page 5, supra, it was the Government and not the taxpayer who cited and relied upon the *Sage* case.[6] This was true also in *Hammond-Knowlton v. United States*, 121 F. (2d) 192 (C. C. A. 2nd, 1941), cert. den. December 22, 1941, No. 327, October Term 1941.

The Government, in the face of this line of unanimous decisions of this Court, concurred in by the Government for more than 20 years, seeks a decision in this case utterly at odds with those decisions. Yet in its brief it makes no forthright request that the *Sage* case or any of

[6] Not until the *Kales* case and the case at bar had the Government questioned in this Court the *procedural* implications of the *Sage* case. Even in cases where the Government has sought to avoid the *constitutional*, as distinguished from the *merely procedural*, implications of the *Sage* case, and has contended that retroactive restrictions on refund actions were justified on the basis of sovereign immunity to suit, even in suits against collectors, it has admitted the scope and authority of the decision in the *Sage* case and related cases in relation to procedure and *res judicata*. See quotations from Government briefs in *Graham v. Goodcell*, 282 U. S. 409, and *Anniston Mfg. Co. v. Davis*, 301 U. S. 337, in our Brief in Opposition, p. 5, footnote 3.

the cases following it be overruled. Such a request, frankly made, would bring into sharp relief the obvious unfairness of overruling unanimous and long standing decisions of this Court, where the result would be to cut off completely presently existing remedies for the recovery of admitted overpayments of tax.

And yet clearly what the Government is seeking is to have the Court overrule the *Sage* case; and in support of its claim, it invokes simply the general rule of public policy against splitting causes of action which was urged unsuccessfully in the *Sage* case. There is no reason why this Court should reach a different conclusion if the question were new. However, let it be conceded for the sake of argument, that if the matter arose now for the first time, the *Sage* case would be decided differently. But the question is not now presented as an original proposition. Unanimous decisions of this Court extending over a period of nearly 23 years have made it clear that a taxpayer can present separate items of its claim for a single year in two actions if he first sued the collector. Any taxpayer was entitled to believe that it was safe in planning its course upon that basis. In such a situation another rule of public policy, the rule of *stare decisis*, applies with much greater force than does the rule against splitting of causes of action, and should certainly be sufficient to prevent this Court from retroactively cutting off presently existing remedies to enforce clear rights to recover taxes admittedly overpaid.

While reasonable repose is desirable and justifies statutes of limitations, estoppel by judgment, res judicata, prescription and the like, it is most important that no such restrictions be retroactively imposed. It is significant that practically all statutes dealing with such matters as limitations, res judicata, jurisdiction of courts, and other such matters are prospective in operation, or contain saving clauses to protect, against destruction of all remedies,

those who had been entitled to rely upon the existing system. The rule of *stare decisis* restrains the Court from accomplishing similar injustices by judicial decisions overruling previous authorities, and gives generally that stability in the law which comes from the knowledge that a question once carefully considered and decided by the court of final resort may usually be considered settled.

We, of course, do not contend that the rule of stare decisis is to be followed blindly. Where real injustice results from an erroneous decision, which clearly outweighs the injustices that may result from correcting the decision, the rule of stare decisis is not to be made an insuperable obstacle to justice and progress. But if the doctrine is to be overridden in any situation, where the authorities are clear and unanimous as they are here, at least two conditions should concur: (1) It should be clear that the established decisions are wrong, and (2) there should be a definite showing that real injustice will result from adhering to the previously settled decisions. Where such showings cannot be made, long settled decisions of this Court should certainly be followed.

It is not clear that the *Sage* case and the cases following it were wrongly decided; and there is no showing whatever that the rule of the *Sage* case has led to confusion or creates any uncertainty or has resulted in oppressive consequences, or that a continuance of the rule until, if ever, Congress sees fit to modify it prospectively will result in any injustice to the Government or taxpayers.

It would be just as unfair in this case for this Court or Congress to take away the present existing right of this taxpayer, or any other taxpayer similarly situated, to recover sums which were illegally collected from it and which it is now clearly entitled under unanimous decisions of this Court to recover, as it would be to abolish the right of a taxpayer to sue in the Court of Claims, after the statute of limitations had run against other remedies previously open

to it. It would be like reducing the limitation period on existing causes of action without allowing a reasonable time for suit. Cf. *McGahey v. Virginia*, 135 U. S. 662.

Frankly, it is thought by some that the whole scheme for suits against collectors is an out-moded form of procedure and that Congress should revise or abolish it.[7] On the other hand, the American Bar Association has gone on record as favoring the retention of the existing right to sue the collector.[8] But whichever of these views prevails, all should certainly agree that if any change should be made Congress is in a better position than this Court to make the change. In the first place, Congress can consider and act upon the subject of collector suits as a whole, whereas this Court can act only on such isolated aspects of the subject as happen to come before it in specific cases, which might easily result in great confusion on the whole subject of collector suits.[9] In the next place Congress can make its action prospective in operation with the result that

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[7] See Report of the Sub-Committee of the Committee on Ways & Means, "The Prevention of Tax Avoidance", 73rd Cong., 2nd Sess., p. 23.

[8] Reports of the American Bar Association, Vol. 65, p. 369.

[9] If this Court were otherwise inclined to overrule the Sage case it should be restrained by a consideration of the confusion likely to ensue. The collector's suit as a form of procedure in tax cases is well established and widely used and its various incidents are well understood. One of the main foundations in the structure of judicial decisions upon which the collector procedure and its consequences are based is the Sage decision. If this foundation stone is removed, what happens to all the other decisions which depend in greater or less degree upon it? What happens to the right of jury trial? Does the taxpayer lose the vitally important protection which the decision in *Graham v. Goodcell* affords against abuse of the doctrine of sovereign immunity? Was the case of *Hammond-Knowlton v. United States*, supra, wrongly decided? We assume that the *Bankers Coal Co.* decision would fall, with the result that taxpayers and the Government would find themselves bound on principles of res judicata as to issues litigated in other years in collectors' suits when at the time of trial the Government and the taxpayer were relying upon clear decisions of this Court that the issues there determined would *not* be binding in other years.

persons, who have shaped their course upon the assumption that they could rely upon the rules laid down by this Court over a period of nearly a quarter of a century, will not be barred by a retroactive change in the rules.

If the situation were one in which Congress were not perfectly free to act, the result might be different, but it is clear that Congress is free to act and that any changes which are to be made in the collector suit as a form of procedure in tax cases can much more fairly and better be made by Congress than by this Court, as was clearly recognized in *United States v. Kales*, where Chief Justice Stone said:

> "The right to pursue the common law action against the collector is too deeply imbedded in the statutes and judicial decisions of the United States to admit of so radical a departure from its traditional use and *consequences* as the Government now urges, without further Congressional action." (Emphasis supplied).

CONCLUSION.

This case is squarely covered by the *Sage* decision; the Government's attempts to distinguish the *Sage* decision are unsuccessful; the Government has advanced no satisfactory reason why this Court should overrule the *Sage* decision; and if any changes need to be made in the collector suit as a form of procedure, such changes should be made by the Congress and not by this Court. The judgment of the court below should accordingly be affirmed.

Respectfully submitted,

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